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JOHN T. FEY, Clerk

No. 326

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

LESLIE ROBERT NUNN,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

PETITION FOR REHEARING

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We petition for rehearing on the following grounds:

The Court has overlooked the mandatory provisions of Section 1257 (2) wherein the constitutionality of a statute has been challenged in the state court "on the grounds of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity."

Congress has made mandatory the right of appeal in such cases.

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282;

Memphis Natural Gas Co. v. Beeker, 315 U. S. 64.

We challenged the constitutionality of the sections of the code for vagueness in the state courts. The District Court of Appeal held against our challenge (see page 10 Appendix, original petition, opinion of District Court of Appeal. Again we challenged the constitutionality in the Supreme Court of California, and that court held against our challenge (pages 17 *et seq.* of appendix, Opinion of Supreme Court).

One justice of the Supreme Court of California held Section 11170 of the Health and Safety Code of California unconstitutional as construed and applied. The majority ruled *contra.*

From these decisions we took a direct appeal. The order of November 5, 1956 dismissed the appeal without reason given. No motion is pending to dismiss it. We respectfully submit we come within the mandatory provisions of Title 28 Section 1257 (2) as construed by this court.

On the same day this court dismissed the appeal it handed down a historic and all-important decision in *Mesaroh v. United States,* in which it condemned "tainted justice."

Nothing could in our view be more tainted than the introduction and use of evidence obtained by the state officer in violation of the very laws of the state and by fraud, deceit, misrepresentation and subterfuge.

As stated by the California dissenting justice in his opinion:

> "If the knowing presentation of perjured testimony in a criminal prosecution amounts to a denial of due process of law (*Mooney v. Holohan*, 294 U. S. 103) it should follow as a matter of course that evidence obtained by means of fraud, deceit and misrepresentation should have the same effect."

In the *Mesaroh* case the government admitted its witness was a perjurer. In the *Nunn* case the State's own testimony was that the officer—the one witness on whom the People relied for proof of the offenses—had done the things denounced by law—to-wit, had obtained the evidence by means of fraud, deceit, misrepresentation and subterfuge. His testimony is not only subject to close scrutiny (*Gordon v. U. S.*, 344 U. S. 414). It must be rejected to preserve the purity of the courts.

The defense also had offered an instruction to the jury, which the court had declined to give, that the statute forbade any person from obtaining a prescription by means of fraud, deceit, misrepresentation and subterfuge, so that the jury might weigh the credibility of the officer, as it might, in a third degree case upon the giving of instructions, weigh the voluntari-

ness of a confession. (*Lisenba v. California,* 314 U. S. 219).

Where, as here, the conduct of the officer is admitted, and not in dispute, the matter becomes one of law for this court to determine whether the statutes, inherently and as construed and applied in this case, violate the due process clause of the Fourteenth Amendment. (*Irvine v. California,* 347 U. S. 128).

We pray for rehearing and the noting of probable jurisdiction of the appeal.

Respectfully submitted,

MORRIS LAVINE
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I, Morris Lavine, Attorney for the appellant, hereby certify that this petition for rehearing is filed in good faith and not for the purpose of delay, and is based upon matters occurring since the filing of the jurisdictional statement on appeal, and is restricted to those grounds.

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